SUPREME COURT, U. S.

OCT 23 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 681

JARBOE BROS. STORAGE WAREHOUSE, INC.,
Petitioner,

v.

ALLIED VAN LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

Table of Contents

	PAGE
Opinion	1
Jurisdiction	1
Question Presented	2
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	7
Conclusion	9
Appendices:	
Appendix A:	
Jarboe Storage Warehouse, Inc. v. Allied Van Lines, Inc., U. S. Court of Appeals for the Fourth Circuit, No. 11,861 — Decided September 5, 1968	1a
Appendix B:	
Amendment 5, Constitution of the United States of America	8a
Amendment 14, Section 1, Constitution of the United States of America	8a

Table of Authorities

Cases

Bayside Fish Flour Co. v. Gentry, 297 U.S. 422	8
Central Bus Operators, Inc. v. Central Avenue Bus Owners Association, 128 N.J. Eq. 177	8
Nametra, Inc. v. American Society of Travel Agents, Inc., 211 N.Y.S. 2d 655	8
Prudential Insurance Co. v. Cheek, 259 U.S. 530	8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Jarboe Bros. Storage Warehouse, Inc., Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered September 5, 1968, affirming the United States District Court for the District of Maryland.

OPINION BELOW

The opinion of the Court of Appeals is reported as Jarboe Bros. Storage Warehouse, Inc. v. Allied Van Lines, Inc., ... F. 2d ....., and it is printed as Appendix A hereto.

JURISDICTION

On September 5, 1968, after deliberating for six months after oral argument the Court of Appeals for the Fourth

Circuit affirmed the decision of the United States District Court for the District of Maryland.

Jurisdiction to review the judgment in question by Writ of Certiorari is conferred on this Court by 28 U.S.C.A., Section 1254(1).

QUESTION PRESENTED

1. *Was the manner of cancellation of the contract between the Petitioner and the Respondent arbitrary and unreasonable and lacking in due process of law?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves an important question of contract law which relates to interstate commerce. It also involves the due process clause of the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

On April 23, 1967, Jarboe Bros. Storage Warehouse, Inc. ("Jarboe") filed a Bill of Complaint for an injunction in the Circuit Court of Baltimore City against Allied Van Lines, Inc. ("Allied") to enjoin the termination of a Non-Carrier Agency Contract between Allied as Carrier and Jarboe as Agent.

Thereafter Allied removed the case to the United States District Court for the District of Maryland where it was tried on August 21st to the 24th, 28th to the 29th, 1967, before the Honorable Frank A. Kaufman.

At the close of Jarboe's case, upon motion of Allied, pursuant to Rule 41 (B) of the Federal Rules of Civil Procedure, Judge Kaufman dismissed the case. Jarboe appealed to the United States Court of Appeals for the Fourth

Circuit, and some six months after argument of the case the decision of the United States District Court was affirmed by the United States Court of Appeals for the Fourth Circuit.

Jarboe or its predecessor has been an agent of Allied for more than 20 years. In 1961, Lester J. Feit acquired all the outstanding stock of Jarboe and became its President. Lester J. Feit was the President of Jarboe at a time in 1965, when he submitted false and inflated bids for the hauling and transportation of goods, and sent the same through the mails. The transportation involved was entirely within the State of Maryland, and the moves that were contemplated and ultimately made were completely within the boundaries of the State. However, because of his use of the mails and the fact that Urban Renewal, a governmental agency, was to pay the cost of the moves, he was indicted by the Federal Government on three counts, to all of which he pleaded guilty on November 2, 1966, and was fined a total of $21,000.00 which he paid. At the time of Feit's conviction Jarboe was an Allied agent pursuant to No. 1, Non-Carrier Agency Contract dated January 16, 1953, as amended August 8, 1963, reading in part as follows:

"1. Carrier for the term hereof covenants:

"1.1 To constitute and employ subject to its reasonable rules and regulations from time to time established the said Jarboe Bros. Storage Whses. as its Agent to solicit, to estimate the weight, size and charges of, to collect charges for and to book, register, pack, crate, prepare for transportation, receive, load, transfer, unload, store, warehouse and deliver for and in behalf of Carrier, shipments of commodities which the Carrier has authority to transport and as from time to time directed by Carrier to provide equipment and to bill and haul such or other shipments of such commodities;

* * * * * *

"2. Agent, for such term, accepts such agency employment at such compensation and covenants:

"2.1 To perform and discharge loyally, diligently and efficiently, all the duties and responsibilities of such agency and employment, under Carrier's complete and exclusive control, direction and supervision and in strict compliance with Carrier's then reasonable rules and regulations, as well as with all laws, orders and regulations of competent governmental authority.

* * * * * *

"3. The Parties mutually covenant:

"3.1 The term hereof shall be for a period of one (1) year from date and thereafter until terminated as follows: Agent may terminate this contract with or without cause upon ninety (90) days written notice to Carrier; Carrier may terminate this contract upon ten (10) days notice to Agent if and only if

Agent for a period of ninety (90) days after notice by the Carrier so to do shall fail or refuse to cure or remedy any breach by him of this agreement claimed by the Carrier in such notice, unless within such period the Agent shall either

(1) demand arbitration as provided in section 3.2 hereof, in which case the contract may be terminated by the Carrier if Agent shall fail fully to comply with the award of such arbitration within thirty (30) days after notice so to do; or

(2) file an action or suit in a court of competent jurisdiction to enjoin such termination in which case the contract may be terminated by the Carrier if and only if there shall be no final decree or judgment of such court enjoining such termination."

Allied Van Lines is the culmination of a need of a number of independent warehousemen for an organization which would allow them to engage efficiently and economically in the interstate movement of household goods, the purpose being to have a national organization to service their needs in interstate commerce, the most important

need being to utilize their equipment and employees further by providing both outgoing and return loads when they were engaged in interstate transportation of household goods. Prior to this a warehouseman would, for example, ship a load of goods from Baltimore to Chicago and return empty. By having a central organization such as Allied the warehouseman would report bookings to Allied who in turn would book return shipments using the equipment and employees of the Agent.

Prior to 1928, a number of independent warehousemen were associated in an organization known as the National Furniture Warehousemen's Association and through this organization, Allied was organized in 1928 as a non-profit Delaware Corporation for the principal purpose of engaging in the interstate movement of used household goods and the voting stock of Allied was held and voted by the Association.

Upon passage of the Motor Carrier Act in 1935, Jarboe and many other independent warehousemen of the Allied group applied for and received from the Interstate Commerce Commission, rights to operate as common carriers by motor vehicles of household goods in interstate commerce in the territories in which they had carried on operations. Jarboe secured such rights in eleven states and the District of Columbia.

In 1936 Allied applied for a certificate of public convenience and necessity authorizing its operations in interstate and foreign commerce as a common carrier by motor vehicles of household goods. In 1939, Allied also applied for a certificate as a new operation. In September of 1940 both applications were denied by the Interstate Commerce Commission.

From 1936 to 1945 Allied sought status as a motor carrier under the Act and submitted various schemes to convince the Interstate Commerce Commission that Allied would exercise the required dominion and control over shipments moving in interstate and foreign commerce. None of the plans involved the surrender by the Allied members of their rights as motor carriers in interstate and foreign commerce. The Interstate Commerce Commission rejected these applications.

Finally in 1945, Allied Van Lines and the independent warehousemen joined in an application before the Interstate Commerce Commission. In this application the individual members agreed to assign their interstate rights to Allied and Allied agreed in return to enter into an AVL-1 contract, lease the members equipment, and each member would obtain one share of voting stock of Allied. The share of stock had a book value of $10.00 and must be surrendered for that sum when a holder is no longer an Agent. It is important to recognize at this point, that Jarboe permanently deprived itself of any right to conduct interstate business other than through Allied by surrendering its interstate right to Allied in return for the AVL-1 contract.

The principal party who was responsible for drawing up the AVL-1 contract was an attorney by the name of John R. Turney, Esq. Mr. Turney was a specialist in interstate commerce matters. Mr. Turney testified before the Interstate Commerce Commission on behalf of Allied regarding the nature of the transaction and the rights assigned by members and the contract they received from Allied.

Mr. Turney was questioned by the Commission in regard to cancellation of a contract between Allied and an Agent. Mr. Turney testified that the contract provided for reasonable rules and regulations to be made by Allied and would

put the question of reasonable rules and regulations to a determination by a court or Board of arbitrators.

The AVL-1 contract allegedly breached by Jarboe is set forth as follows:

> "2.1 To perform and discharge loyally, diligently and efficiently, all the duties and responsibilities of such agency and employment, under Carrier's complete and exclusive control, direction and supervision and in strict compliance with Carrier's then reasonable rules and regulations, as well as with all laws, orders and regulations of competent governmental authority."

It is important to note at this time that this contract referred exclusively to interstate shipment of household goods and did not deal in any way with intrastate shipment.

On December 2, 1966, J. Dayton Ford, General Counsel of Allied wrote to Feit that his adjudication of guilt placed him in breach of his agency contract and that his agency had been rendered incapable of performing its duties.

After the receipt of Mr. Ford's letter Jarboe wrote to Allied asking what it could do to remedy any breach of which it was guilty, and had expressed a willingness fully to perform under the contract. After further correspondence, on April 13, 1967, notice of cancellation was sent to Jarboe. As a result of action by Allied, Jarboe filed suit for an injunction to enjoin the termination of the contract.

REASONS FOR GRANTING THE WRIT

This is a case which involves a contract between Allied Van Lines, one of the largest household movers in the United States, with 1,195 agencies and branches, including 160 outside of the United States, and one of its agents. It, therefore, involves an important question of contract law which relates to interstate commerce under the commerce

clause of the Constitution of the United States. More important, however, there has been a complete lack of due process under the Fifth and Fourteenth Amendments of the Constitution of the United States. The guarantee of due process protects property rights and certainly the contract between Allied and Jarboe was a valid contract and as such a property right which would come under the protection of the due process clause. The denial of a vested right is a deprivation of property without due process of law. See *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, and *Prudential Insurance Co. v. Cheek*, 259 U.S. 530.

The Board of Directors of Allied was without power to remove Jarboe as an Agent by the cancellation of its contract. If, however, they had that right due process required that Jarboe be given full and formal notice of the charges, a hearing and an opportunity to defend the charges, in addition to confront the witnesses against it. See *Nametra, Inc. v. American Society of Travel Agents, Inc.*, 211 N.Y.S. 2d 655, and *Central Bus Operators, Inc. v. Central Avenue Bus Owners Association*, 128 N.J. Eq. 177, 15 A. 2d 608.

It is argued that simply because the injunction proceeding was heard in Court and both sides were aired this would satisfy due process, however, this still does not take away the right of Jarboe to have an intra-corporate hearing. The AVL-1 contract provided that the agent would have a right to cure or remedy any breach of a contract within ninety days of notice by Allied, however, other than a casual suggestion by counsel for Allied, Jarboe was never given an opportunity to find out what did constitute a curing of the breach. This again would constitute a deprivation of property without due process.

When Jarboe became an agent for Allied it irrevocably gave up rights to operate in eleven states in interstate commerce. These rights inured to the benefit of Allied and remain a property right vested in them. Certainly if the Interstate Commerce Commission were to file charges against Jarboe, if Jarboe still retained the interstate rights, Jarboe would be entitled to a hearing before the Interstate Commerce Commission and if dissatisfied with their findings, could then go into Federal Court for a decision as to the validity of their findings. There admittedly was no notice of the charges given to Jarboe prior to the meeting of the Board of Directors of Allied on November 16th-18th, 1966, when it was decided that the contract of Jarboe was to be cancelled. This was unilateral action arbitrary and unreasonable and completely lacking in due process of law. It was, therefore, illegal and a nullity.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,861

JARBOE BROS. STORAGE WAREHOUSES, INC.,
Appellant,

v.

ALLIED VAN LINES, INC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, AT BALTIMORE
(FRANK A. KAUFMAN, District Judge)

(Argued March 7, 1968 Decided September 5, 1968.)

Before Haynsworth, Chief Judge, Butzner, Circuit Judge, and Merhige, District Judge.

Hamilton O'Dunne (Patrick A. O'Doherty on brief) for Appellant, and Francis D. Murnaghan, Jr., (Joseph H. H. Kaplan and James W. Tallant on brief) for Appellee.

BUTZNER, Circuit Judge:

After the president of Jarboe Bros. Storage Warehouses, Inc., was convicted of a felony for submitting false transportation bids, Allied Van Lines, Inc., canceled Jarboe's agency contract. Jarboe sued to enjoin cancellation. The district court — concluding that Jarboe had breached the

contract, that the breach had not been cured, and that the procedure Allied followed in terminating the contract was proper — granted Allied's motion for dismissal under Federal Rule of Civil Procedure 41(b) and denied the injunction. We affirm.

Allied was formed as a not-for-profit corporation under the general corporation laws of Delaware by a number of independent warehousemen. It was designed to provide nationwide business for individual carriers of household goods, primarily by assuring that return loads would be available on long distance hauls. In 1945, in order to permit Allied to qualify as a carrier with the Interstate Commerce Commission under the Motor Carrier Act, its individual members agreed to assign their operating rights to transport household goods in interstate or foreign commerce to Allied for the nominal sum of one dollar. Each became a stockholder in Allied by purchasing one share of its capital stock for ten dollars and entered into a noncarrier agency agreement with Allied. No dividends, other than possible liquidating dividends upon dissolution of Allied, are payable upon the common stock, and all revenues are returned to the agents who originated them after deducting pro rata the cost of Allied's business. The agents agreed to sell to Allied their shares of common stock at par value or book value, whichever is greater, upon cessation of their agencies. Although Allied conducts intrastate operations in 13 states, it is primarily an interstate carrier. It is not licensed to carry on intrastate business in Maryland.

Jarboe transferred to Allied its interstate rights for eleven states and the District of Columbia. In turn, it received a share of common stock and a non-carrier agency contract. Allied did not purchase Jarboe's intrastate business. In 1961 Lester J. Feit acquired all the outstanding stock of Jarboe and became its president.

In 1966 the United States District Court for the District of Maryland fined Feit $21,000 and imposed an 18 months suspended sentence upon his plea of guilty to an indictment charging mail fraud and submitting false bids to a federal agency. Feit, as president of Jarboe, had submitted inflated

bids for the intrastate moving of three companies dislocated by federal urban renewal projects. He had used Jarboe's stationery which displayed the Allied name and mark. To make his bids seem competitive, Feit had forged higher bids on the stationery of another Allied agent, Capital Moving & Storage Co. This stationery also bore Allied's name and mark. Jarboe's truck bearing Allied's name was used in connection with one of the moves.

I.

Jarboe first contends the contract was not breached because it imposed obligations on the parties only when Jarboe was handling a shipment in interstate or foreign commerce, and here the hauls were entirely within Maryland. We reject this argument.

An agent impliedly covenants that he will conduct himself with such decency that he will not injure his employer. See 9 Williston, *Contracts*, Sec. 1014A (3d ed. 1967). This duty of good conduct has been summarized as follows:

> "Unless otherwise agreed, an agent is subject to a duty not to conduct himself with such impropriety that he brings disrepute upon the principal or upon the business in which he is engaged. . . ." *Restatement (Second) of Agency*, Sec. 380 (1958).

The commission of a serious crime is mentioned in the *Restatement* comment as one type of conduct that may breach the agent's duty. Feit's use of Allied's name to achieve his illegal advantage clearly violated the implied duty of good conduct Jarboe owed Allied.

Feit's crime also breached paragraph 2 of the agency contract, in which Jarboe covenanted:

> "To perform and discharge loyally, diligently and efficiently, all the duties and responsibilities of such agency and employment, under Carrier's complete and exclusive control, direction and supervision and in strict compliance with Carrier's then reasonable rules and regulations, as well as with all laws, orders and regulations of competent governmental authority."

The fact that the fraud involved intrastate shipments does not absolve Jarboe. Allied conducts intrastate operations in a number of states and uses the same contracts, drivers' manual, rules and regulations, offices and personnel for them as it does for interstate business. Its agents use their equipment and vehicles for both interstate and intrastate shipments. The agency contract did not expressly restrict Jarboe's rights and duties to interstate shipments. Jarboe had the right to use its stationery and vehicles bearing Allied's name and mark in the transaction of its intrastate business. And the public had no way of telling whether Jarboe was acting in its own capacity or for Allied.

II.

Jarboe next contends that even if the contract were breached, Allied's board of directors wrongfully took the position that Feit's conviction was a breach that could not be cured. It relies on paragraph 3 of the contract, which provides:

"3. The Parties mutually covenant:

"3.1 The term hereof shall be for a period of one (1) year from date and thereafter until terminated as follows: Agent may terminate this contract with or without cause upon ninety (90) days written notice to Carrier; Carrier may terminate this contract upon ten (10) days notice to Agent if and only if

"Agent for a period of ninety (90) days after notice by the Carrier so to do shall fail or refuse to cure or remedy any breach by him of this agreement claimed by the Carrier in such notice, unless within such period the Agent shall either

"(1) demand arbitration as provided in section 3.2 hereof, in which case the contract may be terminated by the Carrier if Agent shall fail fully to comply with the award of such arbitration within thirty (30) days after notice so to do; or

> "(2) file an action or suit in a court of competent jurisdiction to enjoin such termination in which case the contract may be terminated by the Carrier if and only if there shall be no final decree or judgment of such court enjoining such termination."

The district judge properly held this paragraph entitled Jarboe to an opportunity to cure the breach. But his findings of fact do not support Jarboe's contention that the board of directors took the position that the breach was incurable. The trial judge found, first, that Jarboe was given an opportunity to cure the breach and, second, that it did not do so. These two findings are amply supported by the record and are therefore binding on us under Rule 52 of the Federal Rules of Civil Procedure.

A month after Feit had pleaded guilty, the general counsel of Allied, at the direction of the board of directors, wrote Jarboe that Feit's conviction breached the agency contract. He also told Jarboe that its failure to remedy the breach within 90 days would result in termination of the contract ten days after the expiration of the 90-day period. Jarboe's secretary replied that Jarboe would endeavor to cure the breach by performing loyally, diligently and efficiently all the duties and responsibilities of the agency and that unless it failed to do so within 90 days, the contract could not be canceled. Later Jarboe's counsel suggested that some period of probation be worked out.

As a possible cure, Allied's counsel suggested devestiture of Feit's interest, an end to his relationship, and a change in agency name. Jarboe took no steps to do this. It continued Feit in control of its business. It also rejected Allied's offer to substitute a contract that could be canceled by Allied for cause without affording Jarboe an opportunity to remedy any breach. In the meantime, Jarboe was disqualified by the army from carrying household goods. Finally, on April 27, 1967, almost five months after its initial notice, Allied canceled the agency contract.

III.

Jarboe next argues that the procedure adopted to cancel its contract was arbitrary and illegal. It contends that cancellation, carrying with it the obligation to surrender stock, is not permitted by the law of Delaware where Allied is incorporated. It also asserts that even if the contract could be canceled, the board of directors did not have the authority to do so. In support of its position it relies on *Frezzo v. Delaware Mushroom Co-op.*, 38 Del. Ch. 370, 152 A. 2d 303 (1959), which held that a corporation organized under Delaware statutes creating agricultural associations was not empowered to expel a member. Jarboe also relies on *State ex rel. Boldt v. St. Cloud Milk Producers' Ass'n*, 201 Minn. 1, 273 N.W. 603 (1937), which held that, in the absence of a bylaw, the board of directors of a co-operative created under Minnesota's Co-operative Marketing Act could not expel a member.

Neither of these cases is applicable. A contract expressly permits the termination of Jarboe's agency and outlines the procedure to accomplish this. In the cases cited by Jarboe no similar contracts existed. Furthermore, the general corporation law of Delaware provides for management of a corporation by its board of directors and authorizes the board to secure the fidelity of its agents.[1] Also, Allied's certificate of incorporation provides that if the holder of stock ceases to be an agent, he shall offer his stock for sale to the corporation. Finally, the provisions in the contract which allow the cancellation of the agency agreement and the consequent re-purchase of stock held by the agent do not violate public policy, as Jarboe contends. They are reasonable, contractual sanctions to insure the honesty of Allied's agents.

Jarboe also urges that Allied's failure to proceed under section 27 of its bylaws invalidates the cancellation of the contract. Section 27 creates a complaint committee to consider and report to the board of directors all complaints made against agents. After notice to the agent and a hear-

[1] Del. Code Ann. tit. 8, ch. 1, Secs. 141(a), 142(c), (1953).

ing, the committee may make recommendations for penalties, including cancellation of the agent's contract. The board of directors is authorized to review the recommendations, together with the objections of the agent, and enforce the penalty. The bylaws, however, do not require that this procedure be followed in every case. They make it "supplemental to and not in limitation of the general powers of the Board of Directors of the Corporation to deal with particular agents and circumstances so as to protect and enhance the best interests of the Corporation . . ."

The contract entitled Jarboe to notice and a hearing before its agency was terminated. These requirements were satisfied. Allied gave specific notice of the reason for the cancellation in the letter written by its general counsel. By contract the parties had dispensed with an intra-corporate hearing, and substituted proceedings before an arbitrator or a court at the option of the agent. Jarboe elected to have its hearing before a court.[2] The district judge was alert to the critical part the application for an injunction played in the contractual and corporate relationship of the parties. Over Allied's protests, he declined to apply such conventional defenses as an adequate remedy at law and unclean hands. He correctly interpreted the contract to require an independent appraisal of the conduct of both parties in order to determine whether termination was permissible.

The judgment is

AFFIRMED.

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[2] Jarboe appeared with counsel before the Allied board of directors in February 1967 to oppose the termination of its contract. While the opportunity afforded Jarboe to present its position at this intra-corporate meeting lends support to Allied's contention that Jarboe was not denied due process, the case does not turn on the adequacy of this hearing.

APPENDIX B

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE XIV — SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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INDEX

Table of Contents

	PAGE
Statutes	1
Questions Presented	2
Statement of the Case	2-5
Argument:	
I. Allied properly canceled its contract with Jarboe	5-10
II. The case has no aspect of importance justifying the granting of the Writ of Certiorari	10-11
Conclusion	11

Table of Citations

Cases

Cottrell v. Pawcatuck Co., 116 A. 2d 787 (Del. Ch., 1955)	7
Glassberg v. Boyd, 116 A. 2d 711 (Del. Ch., 1955)	7
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 279 (1949), reh. 339 U.S. 605, 612 (1950)	11
Levin v. Sinai Hospital, 186 Md. 174, 46 A. 2d 298 (1946)	7
Magnum Co. v. Coty, 262 U.S. 159, 163 (1923)	11
Murray-Baumgartner Surgical Instrument Co. v. Requardt, 180 Md. 245, 23 A. 2d 697 (1942)	7

Statutes

Title 8, Chapter 1, Delaware Code, 1953:	
Section 141(a)	1, 7
Section 142(c)	1, 7
Delaware L. 1967 C. 50	7

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BRIEF IN OPPOSITION

STATUTES

Sections 141(a) and 142(c) of Title 8, Chapter 1, of the Delaware Code Annotated (1953) provide:

> Section 141(a): "The business of every corporation organized under this chapter shall be managed by a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."
>
> Section 142(c): "The corporation may have such other officers, agents and factors as are necessary, who shall be chosen in such manner and hold their offices for such terms as are prescribed by the by-laws or determined by the board of directors or other governing body, and may secure the fidelity of any or all of such officers by bond or otherwise . . ."

QUESTIONS PRESENTED

1. Did Allied properly cancel its contract with Jarboe?

2. Has the case any aspect of importance justifying the granting of the Writ of Certiorari?

STATEMENT OF THE CASE*

On November 2, 1966, Lester J. Feit, the President and sole stockholder of the Petitioner, Jarboe Brothers Storage Warehouses, Inc. ("Jarboe"), an agent of the Respondent, Allied Van Lines, Inc. ("Allied"), was convicted in the United States District Court for the District of Maryland, of having submitted artificial, contrived and inflated bids by Jarboe for moving within the State of Maryland three companies, whose properties had been condemned for urban renewal purposes and who were being required to relocate. The bids were submitted on stationery of Jarboe which prominently displayed the Allied name and logotype. To create the illusion that the bids were competitive, Feit prepared and submitted higher bids on the stationery of Capitol Moving and Storage Company, Inc. ("Capitol"), another Allied agent, without the knowledge or consent of Capitol. Capitol's stationery also bore the Allied name and logotype, as well as the forged signatures of officials of Capitol.

At the time of Feit's conviction, Jarboe was an Allied agent pursuant to a No. 1 Non-Carrier Agency Contract

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* References herein to the Record are as follows:
1. The Joint Appendix in the United States Court of Appeals for the Fourth Circuit — "App. ....."
2. The Appellee's Appendix in the United States Court of Appeals for the Fourth Circuit — "Appellee App. ....."
3. Respondent's Exhibits in the United States District Court for the District of Maryland — "DX ....."
4. Petitioner's Exhibits in the United States District Court for the District of Maryland — "PX ....."
5. The Appendix in the Petition for Certiorari — "P. Apx. ....."

dated January 16, 1953, as amended August 8, 1963, reading in part as follows:

"1. Carrier for the term hereof covenants:

"1.1 To constitute and employ subject to its reasonable rules and regulations from time to time established the said Jarboe Bros. Storage Whses. as its Agent to solicit, to estimate the weight, size and charges of, to collect charges for and to book, register, pack, crate, prepare for transportation, receive, load, transfer, unload, store, warehouse and deliver for and in behalf of Carrier, shipments of commodities which the Carrier has authority to transport and as from time to time directed by Carrier to provide equipment and to bill and haul such or other shipments of such commodities;

* * * * * *

"2. Agent, for such term, accepts such agency employment at such compensation and covenants:

"2.1 To perform and discharge loyally, diligently and efficiently, all the duties and responsibilities of such agency and employment, under Carrier's complete and exclusive control, direction and supervision and in strict compliance with Carrier's then reasonable rules and regulations, as well as with all laws, orders and regulations of competent governmental authority;

* * * * * *

"3. The Parties mutually covenant:

"3.1 The term hereof shall be for a period of one (1) year from date and thereafter until terminated as follows: Agent may terminate this contract with or without cause upon ninety (90) days written notice to Carrier; Carrier may terminate this contract upon ten (10) days notice to Agent if and only if

Agent for a period of ninety (90) days after notice by the Carrier so to do shall fail or refuse to cure or remedy any breach by him of this agreement claimed by the Carrier in such notice, unless within such period the Agent shall either

(1) demand arbitration as provided in section 3.2 hereof, in which case the contract may be terminated by the Carrier if Agent shall fail fully to comply with the award of such arbitration within thirty (30) days after notice so to do; or

(2) file an action or suit in a court of competent jurisdiction to enjoin such termination in which case the contract may be terminated by the Carrier if and only if there shall be no final decree or judgment of such court enjoining such termination."

At a meeting of the Allied Board of Directors, which took place on November 16-18, 1966, the Board was notified by Allied's General Counsel and Assistant Secretary, J. Dayton Ford, of the plea of guilty and conviction of Feit on the charges contained in the Indictment (App. 119). The Board had before it a copy of the Indictment, a number of newspaper articles concerning the conviction and copies of the bids involved in the Indictment bearing the Allied name and logotype (App. 120; DX 2, 3, 4, 5, App. 374-380; DX 18, 19b2, App. 399-404, 409-411).

The Board thereupon directed its officers to send notice to Jarboe of the cancellation of its Non-Carrier Agency Contract pursuant to Section 3.1 of that Contract (PX 6, App. 259-260).

By letter dated December 2, 1966, J. Dayton Ford notified Jarboe of the action of the Allied Board on November 16-18, 1966, and that "the plea and adjudication of guilt of Lester J. Feit to the three counts of the indictment in Criminal Action No. 27296 in the U. S. District Court for the District of Maryland places you in breach of your agency contract." Jarboe was also told in that letter that it had 90 days from the receipt thereof to remedy its breach.

On April 27, 1967, Jarboe instituted suit in the Circuit Court of Baltimore City to enjoin cancellation of its No. 1 Non-Carrier Agency Contract dated January 16, 1953, as amended August 8, 1963 (PX 3, 6, 8, Appellee App. 1-9). Allied removed the suit to the United States District Court for the District of Maryland, where it was tried on August 21-24, 28-29, 1967, before the Honorable Frank A. Kaufman. At the close of Jarboe's case, upon motion of Allied, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, Judge Kaufman dismissed the case.

In dismissing the case, Judge Kaufman held that Petitioner had breached its contract with Respondent, that Petitioner, though having had the opportunity to do so, had failed to cure its breach and that Respondent had canceled the contract properly. The United States Court of Appeals for the Fourth Circuit on September 5, 1968, affirmed these findings, stating in part:

> "The contract entitled Jarboe to notice and a hearing before its agency was terminated. These requirements were satisfied. Allied gave specific notice of the reason for the cancellation in the letter written by its general counsel. By contract the parties had dispensed with an intra-corporate hearing, and substituted proceedings before an arbitrator or a court at the option of the agent. Jarboe elected to have its hearing before a court" (P. Apx. 7a).

ARGUMENT

I.

ALLIED PROPERLY CANCELED ITS CONTRACT WITH JARBOE

At its meeting on November 16-18, 1966, the Allied Board of Directors directed its officers to issue notice of cancellation to Jarboe of its Non-Carrier Agency Contract pursuant to Section 3.1 of that Contract. By letter dated December 2, 1966, J. Dayton Ford, Allied's General Counsel and As-

sistant Secretary, so notified Jarboe, as well as Jarboe's counsel, Richard Moxley. Allied's notice to Jarboe identifies the breach which was the cause for its issuance as "the plea and adjudication of guilt of Lester J. Feit to the three counts of the Indictment in Criminal Action No. 27296 in the United States District Court for the District of Maryland. . . ."

At this point, under Section 3.1 of the Agency Contract, Jarboe could have challenged Allied's claim of breach by demanding arbitration or by filing an action or suit in a court of competent jurisdiction to enjoin such termination. Instead of following either of these paths, Jarboe admitted "actual breach" and stated that it would "cure and remedy the actual breach of contract by performing and discharging loyally, diligently and efficiently, all the duties and responsibilities of our agency as provided in the agency contract" (DX 6, App. 381-382).

Despite Allied's indication to Jarboe contained in a letter dated January 9, 1967, that Jarboe's business-as-usual approach would not result in a cure, and Allied's General Counsel's suggestion that cure could possibly be brought about by Lester J. Feit's complete divestiture of all interest in and relationship to Jarboe and a change in agency name, Jarboe persisted in its position that it need do nothing more to effect a cure than promise to offend no more. By letter dated April 17, 1967, Allied gave Jarboe the requisite 10 day notice of cancellation (PX 8, App. 260-261).

That the Allied Board of Directors was the proper body to effect the cancellation of the Agency Contract is manifest from the general corporation law of Delaware, as well as from the Certificate of Incorporation, Bylaws and Rules and Regulations of Allied.

Allied was incorporated under the general corporation law of Delaware, Title 8, Chapter 1, Delaware Code, 1953, Section 141(a) of that general corporation law provided that: "The business of every corporation organized under the provisions of this chapter shall be managed by a board of directors . . .", and Section 142(c) thereof further provided:

> "The corporation may have such other officers, agents and factors as are necessary, who shall be chosen in such manner and hold their offices for such terms as are prescribed by the by-laws or determined by the board of directors or other governing body, and may secure the fidelity of any or all of such officers by bond or otherwise . . ."[1]

Article Ninth A of Allied's Certificate of Incorporation concerned with the powers of the Allied Board of Directors specifically provides that it is "in furtherance, and not in limitation of the powers conferred by statute" on the Board of Directors (PX 1, App. 238).

Allied's Board of Directors never relinquished its statutorily given powers "to deal with particular agents and cir-

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[1] Decisions of the courts of both Delaware and Maryland make it clear that the affairs of a corporation are managed and conducted by its board of directors. See e.g., *Glassberg v. Boyd,* 116 A. 2d 711 (Del. Ch. 1955); *Cottrell v. Pawcatuck Co.,* 116 A. 2d 787 (Del. Ch., 1955); *Levin v. Sinai Hospital,* 186 Md. 174, 46 A. 2d 298 (1946); *Murray-Baumgartner Surgical Instrument Co. v. Requardt,* 180 Md. 245, 23 A. 2d 697 (1942).

The general corporation law of Delaware was revised by L. 1967 C. 50, but the language of Section 141(a) was not affected, and Section 142(c), with the language concerning factors eliminated, was divided into two subsections (b) and (c) which read: "(b) The corporation may have such other officers and agents as are desired, who shall be chosen in such manner and hold their offices for such terms as are prescribed by the by-laws or determined by the board of directors or other governing body. (c) The corporation may secure the fidelity of any or all of its officers or agents by bond or otherwise."

cumstances so as to protect and enhance the best interests of the Corporation" and when it passed Rule 27 of the Rules and Regulations of Allied, it particularly stated that the procedures set forth in that Rule for dealing with complaints against agents were "supplemental to and not in limitation of" the aforesaid "general powers of the Board of Directors." Jarboe recognized and stipulated in this proceeding that Rule 27 "is specifically supplemental to the general powers of the Board of Directors to otherwise deal with agents so as to protect the interests of the corporation" (PX 5, App. 256-257).

Nothing in the contract between the parties, the laws of Delaware, in Allied's Certificate of Incorporation, its Bylaws or its Rules and Regulations requires that Allied must give an agent a hearing before cancelling its contract. The contract does provide, however, that, if the agent is dissatisfied with Allied's decision to cancel, it can submit the matter to arbitration or can file suit to enjoin cancellation in a court of competent jurisdiction.

In the instant case, Jarboe not only had the benefit of judicial hearings and determinations on the propriety of Allied's action, but it initially had a hearing before another United States District Judge and a federal petit jury on the facts resulting in the conviction, which was the basis for cancellation of the contract. Jarboe has never denied that Lester J. Feit, Jarboe's President and sole stockholder, while acting for Jarboe, committed the crimes for which he was convicted. In fact, Jarboe, at the trial herein, produced as its own exhibit the transcript of the guilty pleas entered by Lester J. Feit to the charges contained in the indictment filed against him.

It is, consequently, difficult to perceive what purpose would have been served had a hearing been held within

the Allied corporate structure, there being no dispute about the facts. Be that as it may, there is no right in Jarboe, either pursuant to its contractual relations with Allied, or on constitutional grounds of due process, to demand an intra-corporate hearing.

Whenever one party to a contract determines that, in its judgment, the other has committed a breach, the first party has the right to terminate without affording the other a hearing, subject only to the condition that the terminating party must be prepared to sustain the correctness of its position in any court proceeding instituted by the other. The agency contract in the instant case is in no way different in this respect from a contract for sale of goods terminated by a buyer for alleged breach of warranty of fitness. No one would suggest that, before cancelling, the buyer would have to give the seller a hearing on whether there was, in fact, a breach.

It may, indeed, be argued with force that Jarboe was provided with an intra-corporate hearing, inasmuch as it was permitted to appear through its President, Secretary and counsel at a February, 1967, meeting of the Allied Board to show "why the proposed action of the Board of Directors should not be taken". But, whether there was a hearing or not, the factor of controlling importance here was the contractually afforded right to contest Allied's termination of the contract in a court of competent jurisdiction. Jarboe has availed itself of that right and has had its day in court. This assured due process to Jarboe, and no intra-corporate hearing was essential to achieve that end.

The No. 1 Non-Carrier Agency Contract between Allied and Jarboe makes no mention of shipments in intrastate commerce or interstate commerce. Pursuant to Section 2.1 of that Contract, the Agent covenants:

> "To perform and discharge loyally, diligently and efficiently, all the duties and responsibilities of such agency and employment, under Carrier's complete and exclusive control, direction and supervision and in strict compliance with Carrier's then reasonable rules and regulations, as well as with all laws, orders and regulations of competent governmental authority;"

Uncontradicted testimony at trial established that Allied did not have in 1953, nor has it now, an agency contract which concerns solely interstate or solely intrastate commerce but that, on the contrary, the one contract governs all carriage, interstate and intrastate alike (App. 47-51, 67).

The interstate-intrastate distinction was a complete afterthought contrived in desperation out of whole cloth and is repeated in the Statement of the Case section of the Petition, though it was not nor can it be supported.

II.

THE CASE HAS NO ASPECT OF IMPORTANCE JUSTIFYING THE GRANTING OF THE WRIT OF CERTIORARI.

Involved is a single question concerning the propriety, under a particular set of facts, of the manner of cancellation of a contract between two private parties. No real issue of importance under the Constitution, laws or treaties of the United States is posed, nor is any conflict between lower federal courts or this Court's supervisory power over lower federal courts involved. Both the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland held that the Respondent acted properly in canceling the contract, and the Petition is devoid of a reference to any evidence or citation of authority which would even tend toward contrary findings, or demonstrate error on the part of the Courts below.

Petitioner, not being satisfied with the concurrent findings of the District Court and the Fourth Circuit Court of Appeals, now petitions for review by this Court. Such a request is inappropriate. *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 279 (1949), reh. 339 U.S. 605, 612 (1950).

CONCLUSION

Petitioner champions no cause worthy of consideration. Petitioner breached its agency contract through action involving patent disloyalty to its principal and was properly discharged. The propriety of the discharge has been fully litigated and established in proceedings in which Petitioner had its day in court.

The Petition should be dismissed.

Respectfully submitted,

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